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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-02-0028
In re Furrs Supermarkets, Inc.,)
Respondent)

Decision Without Hearing Based on Admissions

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (hereinafter, "PACA"), Complainant has filed a Motion for Decision Without Hearing Based on Admissions, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. § 1.139) (hereinafter, "Rules of Practice"). A copy of Complainant's motion has been served upon Respondent, which has not filed a response thereto.

This proceeding was initiated by a complaint filed on September 12, 2002, alleging that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to one produce seller, Quality Fruit & Veg. Co., El Paso, Texas (hereinafter, "Quality Fruit"), in the amount of \$174,105.05, for 910 lots of perishable agricultural commodities which Respondent purchased, received and accepted in interstate or foreign commerce during the period September 1998 through February 2001. The complaint also alleged that, on February 8, 2001, Respondent filed a Voluntary Petition in Bankruptcy pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.) in the United States Bankruptcy Court of the District of New Mexico (Case No. 11-01-10779-SA), and that the case was converted to a Chapter 7 Bankruptcy on December 19, 2001. The

complaint requested the issuance of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and publication of that finding.

Respondent, acting through its trustee in bankruptcy, filed an answer in which it admitted that it failed to make full payment promptly for the produce purchases alleged in the complaint, although Respondent made several affirmative defenses. However, none of these defenses have any merit.

Respondent's admission that it failed to make full payment promptly is found in its answer at paragraph 4 of its Third Defense, in which Respondent admitted that it made the sales to Quality Fruit on which the alleged payment violations are based but asserted that it did not pay Quality Fruit because Quality Fruit had failed to perfect its claim under the PACA trust provisions (*see* 7 U.S.C. § 499e(c)). The failure of Quality Fruit to perfect its PACA trust claim has no effect on Respondent's statutory responsibility to make full payment promptly for produce purposes. In re Great Western Produce, Inc., 50 Agric. Dec. 1941, 1942 at note 3 (1991).

Additional evidence that Respondent admittedly failed to make full payment promptly to Quality Fruit is found in Schedule F of Respondent's Bankruptcy Petition (attached to Complainant's Motion for Decision Without Hearing Based on Admissions as Exhibit 1), in which Respondent lists Quality Fruit's claim for \$174,105.05 as an unsecured indebtedness. Respondent's admission that it has failed to pay Quality Fruit the amount alleged in the complaint warrants the immediate issuance of a Decision Without Hearing Based on Admissions.

The Department's policy with respect to admissions in PACA disciplinary cases with respect to the alleged failure to make full payment promptly is set forth in In re Scamcorp, Inc., d/b/a Goodness Greeness, 57 Agric. Dec. 527, 549 (1998), as follows:

In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

Respondent has admitted in its answer that it has failed to pay Quality Fruit the amount alleged in the complaint. Therefore, this case must be treated as a "no-pay" case, which warrants the revocation of Respondent's PACA license. However, since Respondent's license has terminated due to its failure to pay the annual renewal fee, the appropriate sanction is a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA, and publication of that finding.

Respondent has put forward several defenses in its answer, none of which have any merit. In Respondent's First Defense, it claims that this disciplinary proceeding is barred by the automatic stay (11 U.S.C. § 362(a)(1)), which took effect at the time Respondent filed for bankruptcy. However, PACA disciplinary proceedings come within the exception to the automatic stay provisions as an exercise of "police and regulatory power" (11 U.S.C. § 362(b)(4)). In re Fresh Approach, Inc., 49 B.R. 494 (N.D. Tex. 1985). It has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. Marvin Tragash Co. v. United States Dep't of Agric., 524 F.2d 1255 (5th Cir. 1975); Zwick v. Freeman, 373 F.2d 110 (2d Cir. 1967), cert. denied, 389 U.S. 835 (1967); In re Fresh Approach, Inc., supra at 496. Further, Congress, in 1978, specifically amended section 525 of the Bankruptcy Code (11 U.S.C. § 525) in order to authorize continuation of the Secretary's

license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. Melvin Beene Produce Co. v. Agricultural Marketing Service, 728 F.2d 347, 351 (6th Cir. 1984); In re Fresh Approach, Inc., *supra* at 496-98.

In Respondent's Second Defense, it claims that the disciplinary action should name the trustee for Respondent as representative of Respondent's bankruptcy estate. Respondent provides no grounds for such a claim and it is rejected. Complainant is not alleging that the trustee committed any PACA violations, so there is no basis for including the trustee as a party Respondent herein.

In Respondent's Third Defense, it argues that the Department has brought the disciplinary complaint against it not for the sanction requested in the complaint, but to collect the amount Respondent allegedly owes Quality Fruit from Fleming Companies, Inc. (Fleming), Lewisville, Texas, a 35.4% stockholder of Respondent during the period in which the alleged payment violations occurred. Respondent has not provided any evidence to support this allegation. Respondent attached to its answer (as Exhibit II) a September 20, 2002, letter written by Complainant to Fleming in which Fleming is informed that it has been determined to be "responsibly connected" with Respondent under the PACA and thus subject to possible licensing and employment restrictions, as provided by the PACA. The letter invites Fleming to respond to this determination and advises that Fleming has a right to request a formal hearing before an Department Administrative Law Judge to contest this determination. The proceeding referred to in the September 20, 2002, letter deals only with the issue of whether Fleming meets the statutory criteria making it "responsibly connected" under the PACA (7 U.S.C. § 499a(b)(9)) and does not

address the issue of the payment violations alleged to have been committed by Respondent. The responsibly connected proceeding involving Fleming is entirely separate from the disciplinary proceeding against Respondent.

Respondent also argues in its Third Defense that its failures to pay Quality Fruit were not willful, flagrant and repeated violations of the PACA. However, failures to make full payment promptly for produce, such as those admittedly engaged in by Respondent, always constitute willful, flagrant and repeated violations of the PACA. In re Caito Produce Co., 48 Agric. Dec. 602 (1989). As stated in In re Hogan Distributing, Inc., 55 Agric. Dec. 622, 633 (1996):

The overriding doctrine set forth in Caito is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time.

As Respondent has admitted all the material allegations of fact contained in the complaint, a the issuance of a Decision Without Hearing Based on Admissions is appropriate, without further procedure or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Furr's Supermarkets, Inc. (hereinafter, "Respondent"), is a corporation organized and existing under the laws of the State of Delaware. Respondent's business address is 4411 The 25 Way N.E., Albuquerque, New Mexico 87109. Respondent's mailing address is P.O. Box 102677, Albuquerque, New Mexico 87184.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 920759 was issued to Respondent on March 2, 1992. This license terminated on March 2, 2002, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, Respondent failed to make full payment promptly to one produce seller, Quality Fruit, the amount of \$174,105.05 for 910 lots of perishable agricultural commodities which Respondent purchased, received and accepted in interstate or foreign commerce during the period September 1998 through February 2001.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent, Furr's Supermarkets, Inc., is found to have committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

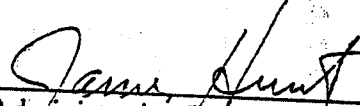
Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the

Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

this 6th day of February, 2003


Administrative Law Judge